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DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 2 and 19

[FAR Case 2016-002; Docket No. 2016-0002; Sequence No. 1]

RIN 9000-AN34

Federal Acquisition Regulation: Applicability of Small Business Regulations Outside the United States

AGENCY: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Proposed rule.

SUMMARY: DoD, GSA, and NASA are proposing to amend the Federal Acquisition Regulation (FAR) to support the Small Business Administration's (SBA) policy of including overseas contracts in agency small business contracting goals. This amendment is consistent with SBA's regulatory changes, which clarify that small business contracting provisions, e.g., set-asides, may apply to contracts performed overseas.

DATES: Interested parties should submit written comments to the Regulatory Secretariat Division at one of the addresses shown below on or before **[insert date 60 days**

after publication in the *FEDERAL REGISTER*] to be considered in the formation of the final rule.

ADDRESSES: Submit comments in response to FAR Case 2016-002 by any of the following methods:

- Regulations.gov: <http://www.regulations.gov>. Submit comments via the Federal eRulemaking portal by entering "FAR Case 2016-002" under the heading "Enter Keyword or ID". Select the link "Submit a Comment" that corresponds with FAR Case 2016-002. Follow the instructions provided at the "Submit a Comment" screen. Please include your name, company name (if any), and "FAR Case 2016-002" on your attached document.

- Mail: General Services Administration, Regulatory Secretariat Division (MVCB), 1800 F Street NW., 2nd Floor, ATTN: Lois Mandell, Washington, DC 20405.

Instructions: Please submit comments only and cite FAR Case 2016-002 in all correspondence related to this case. All comments received will be posted without change to <http://www.regulations.gov>, including any personal and/or business confidential information provided.

FOR FURTHER INFORMATION CONTACT: Ms. Marilyn E. Chambers, Procurement Analyst, at 202-285-7380 for clarification of content. For information pertaining to status or

publication schedules, contact the Regulatory Secretariat Division at (202) 501-4755. Please cite FAR Case 2016-002.

SUPPLEMENTARY INFORMATION:

I. Background

DoD, GSA, and NASA are proposing to amend the FAR to support SBA's changes to the basis for the Governmentwide small business contracting goals. The proposed FAR changes are consistent with SBA's regulatory changes, which clarify that small business contracting rules, e.g., set-asides, may be applied to contracts performed outside the United States. On October 3, 2013, SBA issued a final rule amending its regulations at 13 CFR 125.2 to make this clarification.

The Small Business Act requires the President to establish Governmentwide contracting goals for small business contracts awarded by Federal agencies each fiscal year (15 U.S.C. 644(g)). Historically, SBA has not included certain categories of contracts in the establishment of these goals, for example, contracts with a place of performance outside of the United States. Section 1631(c) of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2013 (Pub. L. 112-239), amended the Governmentwide small business contracting goal provisions established under section 15(g) of the Small Business Act.

Section 1631(c) requires SBA to review and revise the guidelines for the establishment of small business goals for Federal procurement to ensure that agency goals are established in a manner that does not exclude contracts based on (a) type of goods or services for which the agency contracts, (b) how funding for the contracts is made available to the agency by an Appropriations Act or is made available by reimbursement from another agency or account, or (c) whether or not the contract is subject to the FAR. As a result of this review, SBA began including overseas contracts in the establishment of small business goals for FY 2016 to broaden the base of contracts that could be awarded to small businesses under FAR part 19.

II. Discussion and Analysis

The proposed changes to the FAR are summarized in the following paragraphs.

A. Subpart 2.1, Definitions. This subpart is amended to revise the definition of "bundling" by deleting paragraph (3) in its entirety, making the definition applicable outside the United States. The Small Business Act does not exempt an agency from justifying its bundling of contract requirements based on location of award, location of service performance, or location of supply delivery.

B. Section 19.000, Scope of part. This section is amended to clarify that, unless otherwise noted in FAR part 19 (such as for subparts 19.6 and 19.7), contracting officers shall apply this part in the United States and its outlying areas and may apply this part outside the United States and its outlying areas. Additionally, the section is amended to specify that offerors participating in any FAR part 19 procurement are required to meet the definition of "small business concern" at FAR 2.101 and the definition of "concern" at FAR 19.001.

C. Section 19.309, Solicitation provisions and contract clauses. This section is amended to remove language that restricts application of the following provisions and clause to contracts to be performed in the United States or its outlying areas: the provisions at FAR 52.219-1, Small Business Program Representations, and FAR 52.219-2, Equal Low Bids; and the clause at FAR 52.219-28, Post-Award Small Business Program Rerepresentation.

III. Expected Impact of the Rule

Currently, FAR 19.000(b) states that FAR part 19, except for FAR subpart 19.6, applies only in the United States or its outlying areas. Some contracting officers have interpreted the phrase "applies only in the United States" to mean that they are not allowed to use the set-

aside and sole-source procedures of FAR part 19 for overseas procurements. Other contracting officers have interpreted "applies only in the United States" to mean that they are not required to use FAR part 19 procedures for overseas procurements, but may do so if they choose. These conflicting interpretations have resulted in inconsistent use of FAR part 19 procedures for overseas procurements across Federal agencies. Conflicting interpretations may also contribute to low numbers of overseas contract actions that are set aside for small businesses.

This proposed rule will clarify that contracting officers are allowed, but not required, to use the set-aside and sole-source procedures of FAR part 19 for overseas procurements. While SBA's regulations do not explicitly state that use of small business programs is discretionary overseas, SBA clarified and confirmed their position in the preamble of their notice on Small Business Mentor-Protégé Programs published July 25, 2016, at 81 FR 48557. The preamble stated that SBA had issued a final rule previously on October 2, 2013, to amend 13 CFR 125.2 "recognizing that small business contracting could be used 'regardless of the place of performance.'" The preamble went on to explain that SBA merely sought to clarify that

the authority to use small business programs overseas already existed and to highlight contracting officers' discretionary authority to use these programs where appropriate regardless of the place of performance. This proposed rule is consistent with these rules.

As a result of the clarification provided in the rule, contracting officers may set aside more overseas actions for small businesses in the future. However, this rule does not propose to impose additional costs or reduce existing costs for small businesses who may compete. The rule merely allows additional opportunities to be provided to small businesses through set-asides and other tools in FAR part 19 for overseas requirements.

Data are not available on the number of overseas procurements contracting officers have not set aside for small business as a result of the conflicting interpretations described in the first paragraph of this section. According to data obtained from the Federal Procurement Data System (FPDS) for FY 2017 and 2018, there were an average of 1,601,915 awards for performance overseas, including contracts, task and delivery orders, and calls under FAR part 13 blanket purchase agreements. Of those awards, 1,588,334 were made to approximately 8,512 unique large businesses, while 13,581 awards were made to

approximately 1,954 unique small businesses. These numbers indicate that less than 1 percent of actions awarded for performance outside the United States are awarded to small businesses.

Contract awards to small businesses could increase if contracting officers expand their use of set-asides and other tools in FAR part 19 for overseas contracts. FAR 19.502-(2)(b) states that the set-aside authority can only be used where a contracting officer has a reasonable expectation that offers will be received from two small businesses and that award will be made at a fair market price. Similarly, sole-source authority under any of the small business programs also requires certain conditions to be met before being utilized. The conditions for using the FAR part 19 sole-source authorities include, but are not limited to, making award at a fair and reasonable price. It is not possible to identify how many small businesses will have the capability, capacity, or inclination to compete for contracts performed outside the United States. In addition, it is not possible to predict how many overseas procurements contracting officers will set aside for small business as a result of the proposed FAR changes.

DoD, GSA, and NASA invite public comment regarding the driving and restraining forces impacting application of FAR

part 19 to overseas procurements, both on the Government's acquisition workforce and small business concerns.

IV. Applicability to Contracts at or Below the Simplified Acquisition Threshold and for Commercial Items, Including Commercially Available Off-the-Shelf Items

This proposed rule does not change the applicability of the existing provisions at FAR 52.219-1, Small Business Program Representations, and 52.219-2, Equal Low Bids, and the clause at 52.219-28, Post-Award Small Business Program Rerepresentation, which already apply to acquisitions at or below the simplified acquisition threshold and to acquisitions for commercial items, including commercially available off-the-shelf items.

V. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is a significant regulatory action and, therefore, was subject to review

under Section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

VI. Executive Order 13771

This proposed rule is not expected to be an E.O. 13771 regulatory action, because this rule imposes de minimis costs on the public as explained in section III of this preamble, Expected Impact of the Rule. The FAR Council invites comments from the regulated community on the analysis provided in this rule.

VII. Regulatory Flexibility Act

The change may have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.* The Initial Regulatory Flexibility Analysis (IRFA) has been performed and is summarized as follows:

DoD, GSA, and NASA are proposing to amend the FAR to give contracting officers the tools they need, including the ability to use set-asides, to maximize opportunities for small businesses to obtain contracts for performance outside the United States. This change may increase contract awards to small businesses, which will improve agencies' achievement of their small business contracting goals.

The objective of this proposed rule is to provide the Government with additional tools with which to maximize small business participation in contracts performed outside the United States. Currently, the FAR states that the small business

programs do not apply outside of the United States (FAR 19.000(b)). However, on October 3, 2013, the Small Business Administration (SBA) issued a final rule amending its regulations at 13 CFR 125.2 to clarify that its small business contracting regulations apply regardless of the place of performance. With the changes to SBA's guidelines for establishment of small business goals in response to section 1631(c) of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2013 (Pub. L. 112-239), contracts performed outside of the United States are now included in the Government's small business contracting goals.

This rule may have a positive economic impact on small businesses. The proposed rule expands existing procurement mechanisms (e.g., set-asides) to contracts performed outside the United States. Therefore, small businesses available to compete for Federal contracts performed outside the United States are most directly affected by this rule. Analysis of the System for Award Management (SAM) indicates there are over 327,000 small business registrants that can potentially benefit from the implementation of this rule. An analysis of the Federal Procurement Data System (FPDS) for FY 2017 and 2018 revealed that there was an average of 1,601,915 awards for performance overseas, including contracts, task and delivery orders, and calls under part 13 blanket purchase agreements (BPAs). Of those awards, 1,588,334 were made to approximately 8,512 unique large businesses, while 13,581 awards were made to approximately 1,954 unique small businesses. This number could increase if contracting officers expand their use of set-asides and other tools in FAR part 19 for overseas contracts.

Therefore, this rule could affect a smaller number of small businesses than the 327,000 registered in SAM, but potentially more than those revealed by FPDS as having overseas contracts. It is not possible to identify how many of the registered small businesses will have the capability, capacity, or inclination to

compete for contracts performed outside the United States. In addition, it is not possible to predict how many overseas procurements contracting officers will set aside for small business as a result of the proposed FAR changes. Contracting officers must continue to comply with FAR 19.502-(2)(b), which states that the set-aside authority can only be used where a contracting officer has a reasonable expectation that offers will be received from two small businesses and that award will be made at a fair market price. Similarly, sole source authority under any of the small business programs also requires certain conditions to be met before being utilized. The conditions for using the FAR part 19 sole-source authorities include, but are not limited to, making award at a fair and reasonable price.

Nonetheless, we believe that this rule may have a significant positive economic impact on small business concerns competing for Federal contracting opportunities since it will provide greater access to Federal contracting opportunities.

This proposed rule does not include any new reporting, recordkeeping, or other compliance requirements for small businesses.

The proposed rule does not duplicate, overlap, or conflict with any other Federal rules.

There are no known significant alternative approaches to the proposed rule.

The Regulatory Secretariat has submitted a copy of the IRFA to the Chief Counsel for Advocacy of the SBA. A copy of the IRFA may be obtained from the Regulatory Secretariat. DoD, GSA, and NASA invite comments from small

business concerns and other interested parties on the expected impact of this rule on small entities.

DoD, GSA, and NASA will also consider comments from small entities concerning the existing regulations in subparts affected by this rule in accordance with 5 U.S.C. 610. Interested parties must submit comments separately and should cite 5 U.S.C. 610 (FAR case 2016-002) in correspondence.

VIII. Paperwork Reduction Act

The rule does not contain any information collection requirements that require the approval of the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. chapter 35).

List of Subjects in 48 CFR Parts 2 and 19

Government procurement.

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Therefore, DoD, GSA, and NASA are proposing to amend 48 CFR parts 2 and 19 as set forth below:

1. The authority citation for 48 CFR parts 2 and 19 continues to read as follows:

Authority: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 51 U.S.C. 20113.

PART 2—DEFINITIONS OF WORDS AND TERMS

2.101 [Amended]

2. Amend section 2.101, in the definition of “bundling”, by removing paragraph (3).

PART 19—SMALL BUSINESS PROGRAMS

3. Amend section 19.000 by revising paragraph (b) to read as follows:

19.000 Scope of part.

* * * * *

(b)(1) Unless otherwise specified in this part (see subparts 19.6 and 19.7)–

(i) Contracting officers shall apply this part in the United States and its outlying areas; and

(ii) Contracting officers may apply this part outside the United States and its outlying areas.

(2) Offerors that participate in any part 19 procurement are required to meet the definition of "small business concern" at 2.101 and the definition of "concern" at 19.001.

4. Amend section 19.309 by revising paragraphs (a)(1), (b), and (c) to read as follows:

19.309 Solicitation provisions and contract clauses.

(a)(1) Insert the provision at 52.219-1, Small Business Program Representations, in solicitations exceeding the micro-purchase threshold when the contract is for supplies to be delivered or services to be performed in the United States or its outlying areas, or when the contracting officer has applied part 19 in accordance with 19.000(b)(1)(ii).

* * * * *

(b) When contracting by sealed bidding, insert the provision at 52.219-2, Equal Low Bids, in solicitations when the contract is for supplies to be delivered or services to be performed in the United States or its outlying areas, or when the contracting officer has applied part 19 in accordance with 19.000(b)(1)(ii).

(c) Insert the clause at 52.219-28, Post-Award Small Business Program Rerepresentation, in solicitations and

contracts exceeding the micro-purchase threshold when the contract is for supplies to be delivered or services to be performed in the United States or its outlying areas, or when the contracting officer has applied part 19 in accordance with 19.000 (b) (1) (ii) .

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